IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT MINNESOTA

John Doe, Plaintiff, v. University of St. Thomas, Minnesota, Defendant.	Civil Action No. 16-cv-1127 (WMW/KMM) **DEFENDANT'S EMERGENCY MOTION TO STRIKE AND SEAL EXHIBITS TO AND ALLEGATIONS IN PLAINTIFF'S VERIFIED COMPLAINT AND MOTION FOR SANCTIONS**

INTRODUCTION

Pursuant to Fed. R. Civ. P. 12(f), 28 U.S.C. § 1927, and the Court's inherent authority, Defendant University of St. Thomas, Minnesota (the "University" or "UST") brings this emergency motion requesting the Court: (1) strike specific exhibits to Plaintiff's Verified Complaint; (2) seal allegations and information contained in the Verified Complaint and various exhibits; and (3) order Plaintiff John Doe to destroy the medical records of a non-party sexual assault victim that are improperly in his possession and sanction Plaintiff for his conduct.

First, the University requests that the Court strike a private medical record (the "SANE Report") of a non-party sexual assault victim that Plaintiff has filed with the Court as Exhibit 2 to his Verified Complaint. The University also requests that the Court strike the portion of Exhibit 12 to the Verified Complaint which discusses the SANE Report (a "Statement of Medical Review"). Plaintiff does not have permission to possess or utilize the SANE Report. The SANE Report contains highly-sensitive information that was obtained improperly in violation of data privacy laws. Even after being notified to destroy the record by counsel for the sexual assault victim, Plaintiff deliberately ignored the rights of the sexual assault victim and flouted data privacy laws, attaching the SANE Report to the Verified Complaint. Plaintiff's public filing of the SANE Report and another medical report discussing the SANE Report is wholly improper, and serves no purpose but to harass, intimidate, and embarrass a non-party victim of sexual assault. The SANE Report (Exhibit 2) and the Statement of Medical Report (contained in Exhibit 12) should be stricken from Plaintiff's Verified Complaint or alternatively, permanently and entirely sealed from public view.

Second, the University requests that the Court seal detailed allegations in Plaintiff's Verified Complaint that were taken from the SANE Report (paragraphs 76-88 and 150). Further, all information identifying Jane Doe in the Verified Complaint and exhibits should be sealed.

Third, the University requests sanctions against Plaintiff for his continued possession, utilization, and now, public filing of the SANE Report following multiple requests from Jane Doe not to use her medical information. Plaintiff should be ordered to destroy the report and retrieve and destroy all copies in the possession of third parties. Further, Plaintiff exposed Jane Doe's identity and medical information to the public when this case was filed on Friday, April 29, 2016, requiring the University to take immediate action in bringing this motion to protect the privacy of one of its students. Plaintiff's actions have needlessly increased the costs of this litigation, and Defendant is entitled to its attorneys' fees associated with this motion.

PROCEDURAL BACKGROUND

In this lawsuit, Plaintiff John Doe asserts multiple claims against the University which arise out of a Title IX investigation and disciplinary proceedings against him. In December 2015, Jane Doe asserted a complaint against Plaintiff based on an alleged incident of sexual assault that occurred on campus. After a thorough investigation pursuant to the University's policies and procedures, UST determined that Plaintiff violated UST's Sexual Misconduct Policy and engaged in non-consensual sexual conduct with Jane Doe. As a result of that determination, the University suspended Plaintiff for a period of three semesters.

A. Plaintiff's Improper Possession, Use, and his Refusal to Destroy the SANE Report

On December 12, 2015, the day that the incident occurred, Jane Doe went to Regions Hospital for a sexual assault examination. (Compl. ¶ 76.) As a result of the sexual assault examination, the Regions Hospital Sexual Assault Nurse Examiner ("SANE") assembled a SANE Report, which is the subject of the instant motion. (Compl. ¶ 76, Ex. 2.) A SANE is a registered nurse (R.N.) "who has advanced education in forensic examination of sexual assault victims." *See* SANE Development and Operations Guide, at p. 7, available at https://www.ncjrs.gov/ovc_archives/reports/saneguide.pdf. "The purpose of the SANE examination of the sexual assault victim is specifically to assess, document, and collect forensic evidence." *Id.* at 9.

On March 10, 2016, Plaintiff's counsel sent the draft complaint to counsel for Jane Doe, Jenny Gassman-Pines. On March 20, 2016 counsel for Jane Doe notified Plaintiff's counsel that Plaintiff did not have permission to possess the SANE Report, Jane Doe did not consent to any entity to release the report to him, and it must be destroyed. (Affidavit of David A. Schooler, Ex. A.)

On March 21, Plaintiff's counsel responded to the correspondence via email, stating: "[W]hile I would agree that your client has certain rights to privacy relative to her medical records, once she alleges to be the victim of sexual assault, it is the rights of the accused that become paramount and the SANE Report is *always* discoverable. (Schooler Aff., Ex. B (emphasis in original).) Plaintiff refused to destroy the improperly obtained report, and demanded *more* information about the sexual assault victim's history prior to the sexual assault.

In response, counsel for Jane Doe again emphasized that Plaintiff must destroy the report. Moreover, Plaintiff was specifically advised that "you have not redacted the SANE Report in a manner that conceals my client's identity…." (Schooler Aff., Ex. B (emphasis in original).) She further notes, "*if you continue to refuse to return or destroy it, I expect that you will properly conceal her identity, refrain from sharing the document with anyone, and, if you initiate a lawsuit or otherwise attempt to file the SANE report in court, make sure that her private medical information is under seal.*" (Schooler Aff., Ex. B (emphasis added).)

The SANE Report attached to the Verified Complaint as Exhibit 2 contains the utmost sensitive medical and personal information about Jane Doe. The SANE Report is eight pages long, and contains Jane Doe's real name, address, medical history, and the details of her examination by the SANE at Regions Hospital on December 12, 2015. The

SANE Report also includes hand-drawn details regarding where on Jane Doe's body the sexual assault took place. Exhibit 2 contains some redacting or "blacking out" of Jane Doe's real name, however, Jane Doe's real name remains visible through the failed redactions on the Court's Case Management System/Court's Electronic Case Filing ("CM/ECF") system and on printed copies of the SANE Report. In his complaint, Plaintiff cites the SANE Report only one time, in Paragraph 76. However, he discusses the SANE Report in detail in paragraphs 76-88 and 150 of the Verified Complaint. Exhibit 12 to the Verified Complaint also contains a Statement of Medical Review, in which a doctor hired by Plaintiff reviews and discusses the SANE Report in detail.[1]

B. Plaintiff Publically Files the SANE Report and other Identifying Information Relating to Jane Doe

On Friday afternoon, April 29, 2016, counsel for the University received a copy of the Verified Complaint and exhibits from Plaintiff's counsel via email, along with a request that the University's counsel accept service of the Verified Complaint. (Schooler Aff., Ex. C.) On Friday afternoon, April 29, 2016, counsel for the University also learned that the Complaint had been filed and obtained a copy of the Verified Complaint from CM/ECF. (Schooler Aff., ¶¶ 4.) The University's counsel reviewed the publicly filed documents and learned that Plaintiff filed the unsuccessfully redacted SANE Report as Exhibit 2 to his Verified Complaint.[2] (Schooler Aff. ¶ 5.)

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[1] To date, Plaintiff has refused to disclose how he got a copy of the SANE Report.

[2] Additionally, UST notes that there are several instances in the exhibits to the Verified Complaint where Jane Doe's name and address has not been redacted: Ex. 3 (St. Paul Police Department Report), at 1, 4; Ex. 4 (St. Paul Police Department Supplement Report), at 1, 2; Ex. 5 (correspondence between UST and McGraw on December 16,

Counsel for the University immediately contacted counsel for Plaintiff to meet and confer. Counsel requested that Plaintiff remove the SANE Report as an attachment to the Verified Complaint, given that the Report is a highly-sensitive and private medical record of a third-party sexual assault victim, which was apparently improperly obtained by Plaintiff or provided to him in error. (Schooler Aff., ¶ 5.) Plaintiff's counsel agreed only to re-redact exposed information not properly redacted on Exhibit 2 and re-file the exhibit with the corrected redactions. (Schooler Aff., ¶ 6.) Plaintiff's counsel declined to remove the SANE Report from the set of exhibits attached to the Verified Complaint or file it under seal. (*Id.*)

C. **The University Brings the Instant Motion**

As a result of Plaintiff's public filing of Jane Doe's real name, address, private medical information, and details of the alleged sexual assault (including but not limited to the SANE Report), the University's counsel prepared this emergency motion on April 30 and May 1, 2016 to protect the privacy of Jane Doe. (Schooler Aff., ¶ 7.) On May 2, 2016, the University's counsel informed Plaintiff's counsel that it would be bringing an emergency motion to address the issues contained in this motion. (Id.) Only then did Plaintiff's counsel indicate that he may agree to some, but not all, of the protective measures requested by the University. (Id.) Also on May 2, the parties participated in a

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2015, at 7:52 a.m.), at 2; Ex. 7 (correspondence from UST to John Doe); Ex. 9, at 3, ¶ 3 (referencing SANE Report as "narrative of very troubled woman"); Ex. 10 (text message screenshots), at 1, 6; Ex. 11 (notice of outcome of investigation) at 1. Jane Doe's residence hall/address is also referenced in paragraph 43 of the Verified Complaint. The Exhibits to the Verified Complaint also references particulars regarding Plaintiff: Ex. 3, at 6 (address of Plaintiff's residence hall); Ex. 7, 8, 11, and 13 (all referencing Plaintiff's student identification number; Ex. 7, at 1 (Plaintiff's residence hall identified).

telephone call with the Court, in which the University received approval to file this motion.[3] (Id. at ¶ 8.)

Given the exceedingly sensitive nature of the SANE Report, the University seeks immediate, emergency relief to strike the SANE Report (Exhibit 2) and the Statement of Medical Review (contained in Exhibit 12). Alternatively, the University asks that the Court seal Exhibit 2 and the applicable portion of Exhibit 12. Additionally, the University requests that the Court seal all allegations discussing the SANE Report in the Verified Complaint, paragraphs 76-88 and 150. Any additional information in the Verified Complaint or exhibits which identifies Jane Doe should also be sealed. Plaintiff should be ordered to destroy the SANE Report, retrieve and destroy any copies, and be sanctioned for needlessly increasing the costs of litigation.

ARGUMENT

A. The SANE Report and Statement of Medical Review Should Be Stricken as Attachments to the Verified Complaint

1. Standard of Review for a Motion to Strike

Rule 12(f) of the Federal Rules of Civil Procedure empowers a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "Scandalous" matters are "allegations that cast a cruelly derogatory light on a party **or other persons**." *Skadegaard v. Farrell*, 578 F. Supp. 1209, 1221 (D.N.J. 1984). Striking scandalous material achieves the purpose of

[3] To the extent that the parties finalize any agreement regarding the resolution of issues contained in this emergency motion, the parties agreed to notify the Court of such resolved issues.

limiting unnecessary notoriety. Wright & Miller 5C *Fed. Prac. & Proc. Civ.* § 1382 (3d ed.). The standard for a motion to strike scandalous material is "relaxed somewhat…and matter of this type often will be stricken from the pleadings in order to purge the court's files and protect the person who is the subject of the allegations." *Id.*

Scandalous material generally "degrade[s] defendants' moral character, contain[s] repulsive language, or detract[s] from the dignity of the court. *Sierra Club v. Tri-State Generation & Transmission Ass'n, Inc.*, 173 F.R.D. 275, 285 (D. Colo. 1997) (citing *Nault's Auto. Sales v. American Honda Motor Co.,* 148 F.R.D. 25, 30 (D.N.H. 1993)). Even relevant allegations are subject to strike if they satisfy the above-mentioned criteria and go into unnecessary detail. *Id.*

"Redundant" allegations are those which constitute "needless repetition of other averments or which are foreign to the issue[.]" *Wilkerson v. Butler,* 229 F.R.D. 166, 170 (E.D. Cal. 2005) (citations omitted). "A statement of unnecessary particulars in connection with and descriptive of a material matter may be stricken as 'immaterial.'" *Id.* (citations omitted). Redundant or immaterial allegations serve no purpose and do nothing more than complicate the matters before the Court and misdirect judicial resources and party attention. *Sliger v. Prospect Mortgage, LLC,* 789 F. Supp. 2d 1212, 1216 (E.D. Cal. 2011) (acknowledging that a motion to strike is proper where it will make the issues less complicated for the trial court or eliminates "serious risks of prejudice to the moving party, delay, or confusion of the issues").

The Court enjoys "liberal discretion" in determining whether to grant a motion to strike. *Stanbury Law Firm, P.A. v. Internal Rev. Serv.*, 221 F.3d 1059, 1063 (8th Cir.

2000); *see also Wailua Assocs. v. Aetna Cas. & Sur. Co.*, 183 F.R.D. 550, 556 (D. Haw. 1998) (citing *Sur v. United States,* 167 F.2d 431 (9th Cir. 1948)).

2. The SANE Report and Statement of Medical Review Contain Scandalous and Redundant Material

First, the SANE Report and Statement of Medical Review should be stricken as scandalous. The SANE Report is a highly-sensitive eight page medical record containing the details of Jane Doe's examination following her encounter with Plaintiff in December 2015. It also contains information regarding her medical history. The Statement of Medical Review discusses the SANE Report. Jane Doe is not a party to the Complaint, and Plaintiff has not received permission from Jane Doe to review, utilize, or publish the report. Both exhibits contain sensitive information that bears on private conversations between a third-party sexual assault victim and her medical care provider. The inclusion of the SANE Report and Statement of Medical Review as exhibits to the Verified Complaint degrades the moral character of Jane Doe, invades her privacy, and detracts from the dignity of the Court. While the contents of the SANE Report may bear some tangential relationship to Plaintiff's claims, the exacting detail contained therein rises to the level of detail that the court in *Sierra Club* described in determining whether relevant information should be subject to a motion to strike. *See Sierra Club,* 173 F.R.D. at 285.

Second, the SANE Report should be stricken as redundant. Plaintiff's Verified Complaint contains twelve paragraphs referencing statements Jane Doe made to the SANE at Regions Hospital. (Compl. ¶ 76-88.) Despite those references, the Complaint only cites the SANE Report once. (Compl. ¶ 76.) Plaintiff's single direct reference to the

SANE Report demonstrates that inclusion of the SANE Report as an exhibit is unnecessary and redundant in light of his recitation of the relevant portions in the other twelve paragraphs of the Complaint discussing the SANE Report. The inclusion of the SANE Report in a publicly filed document does nothing to further his claims at this stage of litigation. Under *Wilkerson*, the inclusion of the SANE Report constitutes "needless repetition" of Plaintiff's descriptive allegations in Paragraphs 77-88 of the Complaint. 229 F.R.D. at 170.

Third, this is not an innocuous or unintentional submission. Plaintiff was notified in writing that he had no permission or consent to possess the SANE Report and it must be destroyed. In response, Plaintiff inexplicably claims his rights are paramount and the report is discoverable, while at the same time demanding more information from the sexual assault victim. This brazen response ignores privacy laws and, in combination with Plaintiff's decision to publicly file the report, makes clear that Plaintiff will be openly attacking a sexual assault victim's medical history in a civil lawsuit against the University. This is flagrant, bad-faith conduct. [4]

Moreover, Plaintiff's effort to proceed pseudonymously in this lawsuit while at the same time disclosing identifying information and the most private and sensitive medical information about Jane Doe is hypocritical and contradicts the purpose of pseudonymous pleadings. There is a strong presumption against allowing a litigant to proceed by pseudonym. *Luckett v. Beaudet*, 21 F. Supp. 2d 1029, 1029 (D. Minn. 1998) (citing *Doe*

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[4] It is the Court's prerogative to sanction a party sua sponte for bad-faith conduct. Fed. R. Civ. P. 11(c)(3); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991).

*v. Blue Cross & Blue Shield United,*112 F.3d 869, 872 (7th Cir. 1997); *Doe v. Frank,* 951 F.2d 320, 323–24 (11th Cir. 1992); *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe,* 599 F.2d 707, 712–13 (5th Cir. 1979)). Likewise, Rule 10 requires a pleading to identify a party by name. Fed. R. Civ. P. 10(a) ("The title of the complaint must name all the parties…."). Plaintiff's decision to proceed as "John Doe" and at the same time disclose the SANE Report and the Statement of Medical Review indicates an apparent motivation to intimidate, harass, and embarrass Jane Doe. He should not be allowed to proceed under two sets of rules by protecting his identity while exposing Jane Doe's identity and private information. For these reasons, the SANE Report and Statement of Medical Review should be stricken from the Verified Complaint.

B. Paragraphs 76-88 and 150 of the Verified Complaint Should be Sealed

Whether a document or record should be sealed is within the sound discretion of the Court. *IDT Corp. v. eBay,* 709 F.3d 1220, 1223 (8th Cir. 2013) ("Where the common-law right of access is implicated, the court must consider ... [whether] sealing a judicial record would interfere with the interests served by the common-law right of access and balance that interference against the salutary interests served by maintaining confidentiality of the information sought to be sealed."). "[T]he decision as to access is one best left to the sound discretion of the trial court ... in light of the relevant facts and circumstances of the particular case." *Id.* While the federal courts are an "open court system," that system gives way in cases such as this, where the confidential information to be sealed has only a tangential relationship to the claims. *IDT Corp.*, 709 F.3d at 1223 (finding that competitive business information should be shielded from public view).

The Court should seal paragraphs 76-88 and 150 of the Verified Complaint, as well as the SANE Report and Statement of Medical Review if the Court is unwilling to strike these exhibits under Rule 12(f). The information contained in the SANE Report—the highly sensitive and personal medical record of a third-party sexual assault victim—and the allegations taken from the SANE Report (paragraphs 76-88) are of no public concern. There is no reason that the SANE Report or the accompanying allegations should be publicly accessible, no matter how many or what type of redactions are made to the report. While Plaintiff likely included a description of the contents of the SANE Report because he views them as relevant to his claim, filing the actual SANE Report is completely unnecessary, and detailing the statements made in SANE Report are not properly subject to public view. Plaintiff's utilization of the SANE Report serves only to intimidate, harass, and embarrass Jane Doe. Further, the public generally has a strong interest in protecting the identities of sexual assault victims "so that other victims will not be deterred from reporting such crimes." *Doe v. Penzato*, 2011 WL 1833007, at *3 (N.D. Cal. May 3, 2011). There being no basis to file the SANE Report, and no compelling purpose to include detailed descriptions of the SANE Report, the Court should seal Exhibits 2 and portions of Exhibit 12, and the accompanying paragraphs in the Verified Complaint.

C. The Court Should Order Plaintiff to Destroy Copies of the SANE Report and Sanction Plaintiff for Needlessly Increasing the Costs of Litigation

The Court is empowered to sanction parties appropriately for "conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45. Critically, it is within the Court's discretion to determine "whether the extent of a sanction is appropriate." *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 268 (8th Cir. 1993). "The Court is free to craft the kind of sanctions it finds appropriate." *In re Baycol Prods. Litig.*, No. MDL 1431 (MJD/JGL), 2004 WL 1052968, at *18 (D. Minn. Apr. 12, 2004) (Davis, J.) (citing *Chambers*, 501 U.S. at 49). The sanction should correspond to the conduct. *Shepherd v. Am. Broadcasting Cos., Inc.*, 62 F.3d 1469, 1479 (2d Cir. 1995). The Court should adopt two separate sanctions for Plaintiff's separate, but equally egregious, sanctionable conduct.

1. Sanction for Mishandling the SANE Report

Plaintiff's mishandling of the SANE Report is sanctionable. Plaintiff was notified long ago by Jane Doe's counsel that he was not authorized to possess or use it. Plaintiff ignored this and filed the SANE report and other information identifying Jane Doe publically. On April 29, 2016, the public filing was immediately circulated via various publications, such as "Courthouse News Service" alerts, in which the Verified Complaint and exhibits could be downloaded. The University has also learned that at least one news organization has a copy of the Verified Complaint containing the detailed allegations about the SANE Report. Publicly disclosing the identity of a non-party sexual assault victim and her medical records in the face of multiple demands to destroy such information is sanctionable conduct. Plaintiff has identified Jane Doe and her information to the public, and nothing can un-ring this bell. Plaintiff should be required to destroy all copies of the SANE Report in his possession, and retrieve and destroy any copies in the possession of a third party.[5]

2. Sanctions for Improper Litigation Conduct

Plaintiff's conduct justifies sanctions under the Court's inherent authority and 28 U.S.C. § 1927. Immediately upon receiving notice that Plaintiff filed the Verified Complaint on Friday, April 29, counsel for UST contacted counsel for Plaintiff and asked that he withdraw the SANE Report as an exhibit to the Verified Complaint. Plaintiff declined that request. In response, and in an effort to protect the identity of one if its students, UST immediately drafted motion papers over the weekend to achieve the goal of anonymity for the non-party alleged sexual assault victim. Only then did Plaintiff recognize his errors and indicate that he may agree to some of the privacy protections requested by UST.

UST should not be required to shoulder the cost of Plaintiff's inappropriate actions, and it should be awarded its attorneys' fees associated with bringing this motion. This sanction will not affect the merits of Plaintiff's claims against UST. Instead, this sanction will deter similar mishandling of the SANE Report and other highly confidential information that is likely to be subject to discovery in this case, and deter unreasonable litigation conduct.

CONCLUSION

Whether redacted or unredacted, a third-party sexual assault victim should not

[5] The University does not address the discoverability or admissibility of the SANE Report in this motion. Plaintiff should seek to discover the SANE Report pursuant to the discovery rules. The University reserves the right to oppose production of the SANE Report in discovery, either direct discovery or by way of subpoena to any third party.

have her private medical records attached as a public exhibit to Plaintiff's Verified Complaint. The SANE Report—obtained and utilized by Plaintiff without the permission of Jane Doe—contains scandalous, immaterial, and redundant information and it should be stricken from the Verified Complaint. The Statement of Medical Review should also be stricken. The Court should seal paragraphs 76-88 and 150 of the Verified Complaint, which discuss the SANE Report. Finally, Plaintiff should be ordered to destroy the SANE Report and should be sanctioned for his conduct.

Dated: May 2, 2016

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